KAMARUZAMAN YAHAYA & 2 OTHER CASES

v.

MENTERI HAL EHWAL DALAM NEGERI, MALAYSIA & ANOR

HIGH COURT MALAYA, KOTA BHARU
NIK HASHIM JC
[CRIMINAL APPLICATIONS NO: 44-63-96, 44-69-96 & 44-66-96]
4 NOVEMBER 1996

CRIMINAL PROCEDURE: *Habeas corpus - Preventive Detention - Drug rehabilitation - Procedural irregularity - Certificate not signed by authorised person - Report of rehabilitation officer did not contain recommendation - Whether defective - Drug Dependants (Treatment and Rehabilitation) Act - Drug Dependants (Treatment and Rehabilitation) (Forms) Rules 1983, Sch. 2*

EVIDENCE: *Judicial notice - Fact not contemplated - Whether Court could take judicial notice that hospital is a government hospital in the absence of evidence - Evidence Act 1950, s. 57*

WORDS & PHRASES: *"Consider" ('Menimbang') - Whether magistrate erred in 'examining' ('meneliti') report when statutory provision required him to 'consider' ('menimbang') it - Whether 'consider' includes 'examine' and vice versa*

The applicants who were detained for drug treatment and rehabilitation under the Drug Dependants (Treatment and Rehabilitation) Act 1983 ('the Act') applied for writs of *habeas corpus* against the defendant. The issues in this application were: (i) whether the certificate signed by the medical officer which did not state in Form 2 of the Schedule to the Drug Dependants (Treatment and Rehabilitation) (Forms) Rules 1983 ('the Rules') that he was a government medical officer, was valid under s. 6(5) of the Act; (ii) whether the magistrate should have explained the meaning of 'representations' and the significance of making representations to the applicants; (iii) whether the report of the Rehabilitation Officer ('RO') which did not contain his recommendation was complete and valid; and (iv) whether the use of the word 'meneliti' (examined) by the magistrate as opposed to 'menimbang' (considered) in deciding the cases vitiated the procedure.

Held:

[1] By virtue of s. 6(1) of the Act, any person to be detained under the Act must be certified by a government medical officer or a registered medical practitioner to be a drug dependant in Form 2 of the Rules. Unless the word 'government' is stated after the designation 'medical officer', the doctor who signed the certificate in Form 2 cannot be presumed to be a medical officer under the Act. In the cases under consideration although the doctor was from the Pasir Puteh Hospital, there was no evidence to show that it was a government hospital and the court could not take judicial notice of a fact not contemplated under s. 57 of the Evidence Act 1950. Therefore, the certificate was not receivable as proof of its contents under s. 6(5) of the Act.

[2] Although there is no duty imposed on magistrates under the Act to explain the meaning and significance of making representations to the applicants, nevertheless, in this case before the court, as the applicants were not represented by counsels and the inquiry before the magistrate was in the nature of procedure without trial, it was incumbent on the magistrate to explain the meaning of making representations, and the significance and purpose of making representations, to the applicants.

[3] The RO's report without recommendation was not a complete report which the applicants were entitled to be supplied with and to be read out and explained to them under the law. Though the magistrate was not bound by the RO's recommendation, it nevertheless played an influential role in his decision. The omission had therefore rendered the report incomplete and defective and had also prejudiced the applicants' rights to make representations properly.

[4] Generally, the use of the wrong term to decide the case under the Act is not fatal, so long as there is evidence to support the order or judgment. 'Menimbang' (consider) includes 'meneliti' (examine) but not otherwise. Since the law required the court to 'consider' and not 'examine', the use of the wrong term at the critical stage of the judgment coupled with too many serious flaws, was fatal to the validity of the detention orders.

[Application allowed.]

Obiter

There should be a uniform standard format for pre-prepared notes (if any) to be used in these types of proceedings, to ensure that the words and phrases used therein conform strictly to the requirements of the Act and the Rules.

Cases referred to:

Hoo Thian Siong v. PP [1988] 1 CLJ 176 ***(refd)***

Mahmod Jaudin v. Penguasa Serenti Sungai Besi Selangor & 2 Ors [1996] 3 AMR 2920 ***(refd)***

Re Roshidi bin Mohamed [1988] 2 MLJ 193 ***(cit)***

Sanuar Kamarudin Ahmad v. Menteri Hal Ehwal Dalam Negeri Malaysia & Anor [1996] 5 MLJ 1 ***(foll)***

Legislation referred to:

Drug Dependants (Treatment and Rehabilitation) Act 1983, s. 6(1)(a), (b), (3), (5)

Drug Dependants (Treatment and Rehabilitation) (Forms) Rules 1983, r. 2, Form 2, Sch 2

Evidence Act 1950, s. 57

For the 1st applicant - Mohd Kamil Hj Samad; M/s Mohd. Kamil & Co
For the 2nd applicant - Che Azmi Che Omar; M/s Wan Haron, Sukri & Nordin
For the 3rd applicant - Latifah Ariffin; M/s Latifah Ariffin & Co
For the respondents - Ahmad Zakhi Mohd Daud, FC

Reported by Anne Khoo

JUDGMENT

Nik Hashim JC:

There are three seperate applications for writs of *habeas corpus* in this judgment. The applicants are:

1. Kamaruzaman bin Yahaya
   (C.A. 44-63-96) ('1st applicant')

2. Syed Muhamad Asif bin Syed Ahmad
   (C.A. 44-69-96) ('2nd applicant')

3. Mohamed Ali bin Mohamed
   (C.A. 44-66-96) ('3rd applicant')

They were ordered by two different Magistrates to undergo treatment and rehabilitation for a period of two years and thereafter to undergo after-care supervision of Rehabilitation Officer for another two years under s. 6(1)(a) of the Drug Defendants (Treatment) and Rehabilitation Act 1983 ('the Act'). Their applications were heard seperately. However, I decided to give one judgment as the three learned Counsel for the applicants had agreed to adopt each other's arguments to support their applications. The three cases involve the same issues and they are:

1. Whether the certificate signed by the medical officer without stating in Borang 2 that he was a government medical officer is receivable under s. 6(5) of the Act;

2. Whether the Magistrates should explain the meaning of "representations" and the significance of making representations to the applicants;

3. Whether the report by Rehabilitation Officer without stating his recommendation therein is complete and valid;

4. Whether the usage of the word "meneliti" as apposed to "menimbang' by the Magistrates in deciding the cases vitiates the proceeding.

I have listed in *Sanuar Kamarudin bin Ahmad v. Menteri Hal Ehwal Dalam Negeri Malaysia & Anor.* [1996] 5 MLJ 1 at p. 4, six conditions precedent which are required to be complied with strictly before an order for detention for treatment and rehabilitation under the Act can be lawfully made on a drug dependent, and since they are of central importance for consideration of these cases I must reproduce them:

(1) Where a person is arrested he shall be informed as soon as may be of the grounds of his arrest (see art. 5(3) of the Federal Constitution);

(2) The person to be detained is certified by a government medical officer or a registered medical practitioner to be a drug dependent (see s. 6(1) of the Act);

(3) The person to be detained must be given the opportunity of making representations and not merely appeals and pleas (see s. 6(1) of the Act; *Hoo Thian Siong v. PP* [1988] 2 MLJ. 401);

(4) The Magistrate must consider a report by a Rehabilitation Officer:

(a) a copy of such report must be supplied to the person to be detained; and

(b) such report must be read out and explained to him (see s. 6(3) of the Act; *Re Haji Sazali* [1992] 2 MLJ 864);

(5) In making the order, the Magistrate must have regard to the circumstances of the case, and the character, antecedents, age, health, education, employment, family and other circumstances of the person to be detained (see s. 6(4) of the Act; *Re Haji Sazali* [1992] 2 MLJ 864);

(6) The Magistrate must keep a record of the proceedings and the fact that the conditions precedent in sub-ss. (1), (3), (4) and (5) of s. 6 are complied with (see *Re Roshidi bin Mohamed* [1988] 2 MLJ 193)

I wish to repeat what I said in *Sanuar* at same page para. D:

> The importance of s. 6 needs no emphasis. Its provision is penal in nature, affecting the freedom of an individual. It is therefore advised that a Magistrate dealing with such a case appreciate the provision well before exercising his summary powers under the Act.

It would appear from the many cases brought before this Court the conditions No. (2) and (3) stated above are often misunderstood and not followed and as a result many applications for *habeas corpus* were allowed.

Before me, Puan Latifah binti Ariffin for the third applicant, has challenged the validity of the medical report in Borang 2. She said there is no evidence on record to show that the doctor who signed the certificate was in fact a government medical officer. With respect, I agree with her submission.

Form (Borang) 2 is one of the twenty-seven forms prescribed in the Schedule to the Drug Dependants (Treatment and Rehabilitation) (Forms) Rules 1983 ('the Rules'). Rule 2 provides:

> The forms to be used for the purpose of the Act shall be those appearing in the Schedule.

By reason of the word **'shall'** in the rule, I hold that the provision is mandatory and therefore, strict compliance with its provision is called for. The **Schedule** prescribes Form 2 in the following format:

FORM 2

DRUG DEPENDANTS (TREATMENT AND REHABILITATION) ACT 1983
[Section 6(1)]
CERTIFICATE AS TO DRUG DEPENDENCY

To:
The Magistrate/President)
Magistrate's/Sessions Court) ...

I, ..., **a government medical officer**/registered medical practitioner, having carried out the necessary test upon ... NRIC No. ... of ... certify that he/she is/is not a drug dependent within the meaning of the Act. The dangerous drug/ drugs through the use of which he/she became a drug dependent is/are ...

Dated the ... 19 ...

...
(Medical Officer/Registered Medical Practitioner).

c.c.

Rehabilitation Officer, ...

[Emphasis added]

The need for the certificate to be signed by a government medical officer is clearly seen in s. 6(1) which states:

> Where a person who has undergone the tests referred to in s. 3 or 4, and, in consequence of such tests, is satisfied by a **government medical officer** or a registered medical practitioner to be a drug dependent, the officer shall produce him or cause him to appear, before a Magistrate and if the Magistrate, after giving such person an opportunity to make representations:
>
> (a) ...
>
> (b) ...
>
> [Emphasis Added]

In the cases under consideration, the same format in the form of **Borang 2** was used, but without the word **'kerajaan' (government)** after the designation **"Pegawai Perubatan"** being mentioned in the Borang.

In my view, unless the word **"kerajaan"** is stated after the designation **"Pegawai Perubatan"** the doctor who signed the certificate in **Borang 2** cannot be presumed to be a government medical officer under the **Act**. Neither the Court can presume he was a government medical officer simply because the doctor was from Hospital Pasir Puteh.

There is no evidence to say that the hospital is a government hospital. The Court cannot take judicial notice of a fact not comtemplated under **s. 57 of the Evidence Act 1950.** Thus, in the absence of the word 'kerajaan" in **Borang 2** or positive proof that the certificate was so signed by a **government medical officer,** the certificate so produced cannot be said to be valid medical certificate receivable by a Magistrate as proof of its contents under s. 6(5), which provides:

> A certificate under sub-s. (1) purporting to be signed by a **government medical** officer or a registered medical practitioner shall be receivable by a Magistrate without proof of the signature thereon, and the Magistrate shall accept it as proof of its contents, unless the contrary is proved.

Since there is no proof of its contents, the medical certificate is worthless providing nothing to support that the applicant is a drug dependent, and indeed on this very ground alone, it is sufficient for the application to be allowed.

That, however, is not the end of the matter. There are three other grounds which, to my mind, merit serious consideration by the Court.

Che Azmi bin Che Omar, for the 2nd applicant, argued that based on the record, his client did not seem to understand the significance of making representations. Whilst Encik Mohd. Kamil bin Hj. Samad for the 1st applicant submitted that since making representations means the right to protest or challenge as opposed to making appeals or pleas, it follows therefore that the Magistrates are required to explain its meaning to the applicants. He contended that failure to do so would make the order under s. 6(1) invalid. Y.A. Mustapha Hussain J in *Hoo Thian Siong (supra)* attempted to explain the meaning of making representations when he said this at p. 402 H:

> The Act specifically enacted the words "giving such person an opportunity to make representations." Making representations here means the right to protest, which by necessary implication and reading it in the context of Art. 5(3) of the Federal Constitution, is a right to challenge whatever is being brought against him.

It is therefore, in my view, imperative that the Magistrates do acquaint and appreciate the meaning of the word **"representations"** and the significance and purpose of making representations before exercising their powers under the Act. Y.A. Mohamed Ariff J took pain to explain in *Re Roshidi (supra)* when he stated at p. 196 (H - left):

> Had she fully appreciated it and understood the significance and purpose of making representations as provided in s. 6(1) of the Drug Dependants (Treatment and Rehabilitation) Act 1983 she would, could and should have explained its purpose, in the same way one would have attached importance on the requirement to explain to an accused the charge against him, and the consequences of the three alternatives when the defence is called in any criminal trial or when an amended charge is to be read and explained with all its meaning and the consequences of the plea to an accused in the criminal trial. Assuming she has done so, it would have been reflected in the record of proceeding which she did not have. So one is left in doubt as to what actually transpired at the proceeding in the absence of the record. If she had done so, the would-be detainee would have properly understood the purpose and significance of making representations.

In the cases before me, the learned Magistrates had used the same format of pre-prepared notes in the proceedings, and one of the head notes was written with **"Representasi Penama"** and followed by a short written answer **"Tiada Komplain"** supposedly given by the applicants. At a glance, it would appear that the Magistrates had complied with the law of providing the applicants the opportunity to make representations. But the question is whether the applicants trully understood the true meaning of the word **"representasi"**. From the closer examination of the records, I hold that they did not understand the word. **"Representasi"** is derived from the word **"representations"**. In the

context it is used in the Act, **"representations"** has legal connotation in its meaning. It is true that there is no duty imposed on the Magistrates under the **Act** to explain the meaning and significance of making representations to the applicants. Whilst with respect, I agree with Y.A. Suriyadi b. Halim Omar J in *Mahmod bin Jaudin v. Penguasa Serenti Sungai Besi Selangor & 2 ors.* [1996] 3 AMR 2920 at p. 2926 that "there is absolutely nothing in the relevant Act which required the Magistrate either to explain the procedures to the respondents or to educate the latter on a Court's discretionary powers", nevertheless in my view, in order to be fair to the applicants, especially so they were not represented by Counsel during the proceedings and furthermore, the inquiries before the Magistrates are in the nature of a proceeding without trial, it is incumbent on the presiding Magistrates to explain the meaning of the word **"representations"** (representasi) and the significance and purpose of making representations to the applicants, so that with the explanations, they would know their rights and consequences of the proceedings. It is the duty of the Magistrates to see that the proceedings before them are conducted fairly and properly. In order to avoid confusion, I suggest that instead of using **"Representasi Penama"** in these cases, a much simpler and plain head note, for example: **"Penama diberi peluang membuat bantahan dan diterangkan maksudnya"** be used in the proceeding. Whatever 'bantahan' or answer given by the applicants following the above inquiry must be recorded in full in the notes of the proceeding. If the above proposals are followed, then I think, the applicants cannot be heard to say that they are not given the opportunity to make representations and that they do not understand the significance of making representations.

Another point of not less importance which the Magistrates must consider before making an order either under para. (a) or (b) of s. 6(1) is to be consider a report by a Rehabilitation Officer ('R.O'). The 1st applicant at para. 11 of his affidavit complained that the R.O.'s report was incomplete in that the R.O. omitted to make his recommendation in the report. Accordingly, he argued, the report that was supplied to him was defective thereby contravening s. 6(3).

Here is what was stated at p. 3 para. 8 of the R.O.'s report:

> 8. SYOR PEGAWAI PEMULIHAN:
> Syor akan dikemukakan pada tarikh yang akan ditetapkan oleh Mahkamah.

Section 6(3) requires:

> The Magistrate shall, before making an order either under para. (a) or (b) of sub-s. (1), consider a report by a Rehabilitation Officer on such person, a copy of which shall be supplied to such person, and which shall be read out and explained to him.

As the records show, it is not disputed that the applicant was served with the R.O.'s report minus the recommendation, and it was read over to him as such. In my opinion, the report without the recommendation, is not a complete report which the applicant is entitled to be supplied and to be read out and explained to him under the law. The object of the **Act** is to provide for the treatment and rehabilitation of drug dependents, and by its provisions the R.O.'s report is very important piece of evidence for consideration by the Magistrates. The end of justice would be served if the Magistrates and the applicants are equally served with the R.O.'s report complete with his recommendation. Though the Magistrates are not bound by the R.O.'s recommendation, nevertheless it plays an influential role in his decision whether the applicants had to undergo treatment and rehabilitation or not. The recommendation becomes all the more important material to the applicants as it can be the basis of their objections in the proceeding. In the result, the omission of the recommendation in the R.O.'s report had not only rendered the report incomplete and defective but had also prejudiced the applicants' right to make representations fairly properly.

Finally, Encik Mohd. Kamil bin Hj. Samad complained that the learned Magistrate at the end of the proceeding had used the term **"meneliti"** (examine) instead of **"menimbang"** (consider) in deciding the case, and by so doing, he submitted that the Magistrate had misdirected himself in law resulting the order he made invalid.

Section 6(3) requires the Magistrate, among other things, before making the order either under para. (a) or (b) of s. 6(1), to consider the R.O.'s report.

Generally, in my view, the use of wrong term to decide the case under the Act is not fatal, so long as there are evidence to support the order or judgment and that the Magistrate has complied strictly with the mandatory provisions of the **Act** and the **Rules.**

"Menimbang" includes **"meneliti"** but not otherwise. They do not bear the same meaning. Since the law requires the Court to **'consider'** and not to **'examine'**, the use of wrong term at the critical stage of the judgment coupled with the presence of too many serious flaws in the cases, to my mind, is fatal to validity of the detention orders and the applicants' detention thereunder.

It is significant to note that at the very outset, Encik Ahmad Zakhi bin Mohd Daud, learned Federal Counsel for the respondents, obviously acting on the advice of his superior, did not, however, object to the applications and left to the wisdom of the Court for decision.

In the event, I have no discretion but to grant the three applications. It follows that the three applicants be set at liberty forthwith and I so order.

Before departing I would respectfully tender advice that if at all pre-prepared notes are to be used in the proceeding, which the Court has no objection, there must be a uniform standard format applicable throughout the country, and if there is one, do ensure that the words and the forms used therein conform strictly to the requirements of the **Act** and the **Rules**. Perhaps, this judgment may be useful as providing yet another precedent on the subject of detention of drug addicts for treatment and rehabilitation cases in this country.